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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1965

No. 590

FLORIDA-GEORGIA TELEVISION COMPANY, INC.,
Petitioner,

and

FEDERAL COMMUNICATIONS COMMISSION

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

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No.

FLORIDA-GEORGIA TELEVISION COMPANY, INC.,
Petitioner,

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FEDERAL COMMUNICATIONS COMMISSION.[1]

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

Petitioner prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the District of Columbia Circuit entered in the above entitled action on May 6, 1965.

Opinions Below

The opinion of the Court of Appeals, which is not yet reported, is printed as Appendix A hereto. The opinions of the Federal Communications Commission and of the Hearing Examiners are reported at 35 F.C.C. 401 and are printed as Appendices B and C hereto.

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[1] This caption is unusual because there is no party with an interest adverse to petitioner with respect to the issues raised. See pp. 7-11, *infra*. Out of an abundance of caution we have served all persons who were parties below.

Jurisdiction

The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1). The judgment of the Court of Appeals was entered on May 6, 1965. A timely petition for rehearing was denied on June 21, 1965.

Questions Presented

The court below set aside a decision of the Federal Communications Commission reaffirming its grant in 1956 of a construction permit to petitioner. The Commission in 1960 had reopened the record to determine whether the grant should be set aside by reason of any impropriety or misconduct by any of the participants in the original proceeding. The Court of Appeals affirmed the determination of the Commission that the unsuccessful applicant, appellant below, should be disqualified and that petitioner, the successful applicant, was not disqualified. The court, however, went on to nullify the original proceeding, setting aside the Commission's grant to petitioner and directing the Commission to accept new applications for a permit from any qualified person, including petitioner. The following questions are presented:

1. Whether, having decided that the Commission had properly disqualified the appellant below, there remained a case or controversy upon the basis of which the court had jurisdiction to set aside the Commission's grant of the license to petitioner and to order the Commission to institute a new proceeding and to accept new applications.

2. Whether, assuming a case or controversy was presented, the court exceeded the proper scope of review and invaded the province of the Commission in voiding the grant and directing the Commission to accept new applications.

Statutes Involved

The statutes relevant to this petition are set forth in Appendix D hereto.

Statement

In August 1956, after a comparative hearing on three mutually exclusive applications, the Federal Communications Commission granted petitioner a construction permit for Channel 12 in Jacksonville, Florida (J.A. 277). Neither of the losing applicants, Jacksonville Broadcasting Corporation and the City of Jacksonville (hereinafter referred to as "JBC" and "the City") appealed. In due course a license was issued to petitioner and duly renewed.

In 1958, testimony before a Congressional subcommittee suggested that improper *ex parte* contacts with the Commission might have been made by one or more of the applicants for Channel 12. After investigation, the Commission, on August 2, 1960, *sua sponte* ordered a hearing to determine whether the award to petitioner should be set aside and whether any of the applicants should be disqualified (J.A. 281-84).

Following an extensive further investigation by Commission counsel, hearings were held which produced more than 1200 pages of testimony and 118 exhibits. The Hearing Examiners on April 11, 1962 issued an initial decision (App. C, pp. 49-78, *infra*) holding (1) that both JBC and the City were disqualified because of attempts by persons identified with them to influence the Commission's decision by improper means; (2) that no person identified with petitioner made any *ex parte* representations to the Com-

[2] In addition to the findings noted in the text, the Examiners rejected contentions made during the proceeding, that there were two or three additional improper efforts to influence the Commission's decision, as not supported by the evidence. In addition, the Examiners noted that the petitioner, through its own representatives and through others whose

mission; (3) that there were two *ex parte* representations to the Commission in support of petitioner, neither one known to or attributable to petitioner; (4) that petitioner was not disqualified because nothing in the record reflected adversely upon it;[2] (5) that Commissioner Richard A. Mack should have disqualified himself from participating in the original decision because he had solicited advice about the merits of the competing applicants from a friend who was not identified with any applicant;[3] (6) that because of Commissioner Mack's disqualification the Commission's original decision was void *ab initio* and that the grant to petitioner should be set aside; and (7) that because petitioner had committed no impropriety its operating authority should be continued pending final decision by the Commission.

The Commission's unanimous decision, issued on September 16, 1963, upheld the Examiners in disqualifying JBC, in finding petitioner qualified and free from misconduct of any kind, and in finding that Commissioner Mack should have disqualified himself from participating in the proceeding.[4] Because Commissioner Mack had participated, the Commission set aside the original grant as void *ab initio;* but because petitioner was innocent of any misconduct, the Commission made a new grant to petitioner *nunc pro tunc.*

JBC appealed. It contended that the Commission had erred both in finding it disqualified and in finding petitioner qualified. The court below held, first, that the disqualification of JBC was amply supported by the evidence. Next,

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assistance it enlisted, held discussions with appropriate government officials with respect to the Navy Department's objection to the height of petitioner's proposed tower. Neither the Examiners, the Commission nor the court has ever suggested that these efforts were in any respect improper.

[3] No advice was given suggesting favorable consideration for petitioner.

[4] The Commission reversed the Examiners' finding with respect to the City and held it not disqualified, but the City had stated that it did not seek the permit.

it rejected the Commission's contention that the court's affirmance of the disqualification of the appellant foreclosed further review of the Commission's decision. The court then affirmed the Commission's finding that petitioner was qualified.

Since JBC had not challenged the right of the Commission to make a new grant on the basis of the original record as supplemented, this disposed, in favor of the Commission and the petitioner, of all the issues raised and argued by the appellant. However, the court did not thereupon affirm the Commission's order. Rather, it set it aside because it disagreed with the Commission's action in making a new grant to petitioner. The court asserted, without any reference to the evidence upon which it relied, that the original grant "must be held to have been influenced by the *ex parte* representations made for [petitioner's] benefit," and held that in these circumstances the Commission should be required to accept new applications from any qualified applicant. This included petitioner, but the court ordered that petitioner must compete "on a completely equal and in no sense a preferred basis with any other applicant who might apply."[5]

In short, the court held that the *ex parte* representations, though not made by or attributable to petitioner, required the nullification of all the Commission's proceedings and licenses since 1953. The Court did not, however, explain why—or even, for that matter, state that—it was arbitrary and unreasonable for the Commission to have adopted the contrary view that, while Commissioner Mack's disqualification required the voiding of the original grant, it did not affect the hearing record, so that a grant by the present

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[5] Under the Commission's practice, a licensee with a good record of performance is preferred over competing applicants. See e.g., *Wabash Valley Broadcasting Corp.*, 35 F.C.C. 677 (1963); *Hearst Radio Inc.*, 15 F.C.C. 1149 (1951).

Commission could properly be made on the basis of that record.

Reasons for Granting the Writ

This case presents, in aggravated form, an example of the recent marked shift in the boundaries dividing the respective responsibilities of the Federal Communications Commission and the reviewing court. The Court of Appeals for the District of Columbia Circuit has exclusive appellate jurisdiction to review decisions of the Federal Communications Commission granting or denying radio and television licenses. 47 U.S.C. 402(b). In a number of cases decided during this past term, four of which are now before this Court on petition for certiorari,[6] that court has undertaken a close superintendence of the Commission's exercise of its statutory responsibilities, and has based its decisions not upon the standards established by this Court in cases such as *FCC* v. *Schreiber,* 381 U.S. 279, decided only last term, but rather upon the court's own view of the requirements of the public interest.

So sharp a departure from the ordinary norms respecting judicial review suggests the possibility that the Court of Appeals considers its authority under the Communications Act to be different from the authority of courts reviewing decisions of other agencies. And, in fact, in one of the cases now pending before this Court, *Halpern and Seltzer* v. *F.C.C.* (No. 500), the Court of Appeals apparently rested its decision upon a novel and, we believe, erroneous interpretation of section 402(h) of the Act, 47 USC 402(h), one of the provisions dealing with judicial review. In the case at bar, moreover, the Court of Appeals not only overreached its statutory review authority but also exceeded

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[6] In addition to this case, they are: No. 294, *Mid-Florida Television Corp.* v. *FCC;* No. 500, *Halpern & Seltzer* v. *FCC;* No. 397, *United States* v. *American Broadcasting-Paramount Pictures, Inc.*

its constitutional power under Article III, as that power has been defined by this Court. In such circumstances, action by this Court is necessary so that the proper balance between the Commission and the Court of Appeals may be reestablished.

1. *"Case or controversy."* We discuss first our contention that, once the Court of Appeals held that the Commission had properly disqualified JBC, the appellant below, it had no power under Article III of the Constitution to go on to set aside the Commission's grant to petitioner and to order the Commission to accept new applications for Channel 12.[7]

The constitutional requirement that forbids a court from acting except when an actual "case or controversy" is presented applies with full force to appellate courts when reviewing the decisions of administrative agencies. *Rochester Tel. Corp.* v. *United States,* 307 U.S. 125, 131. Ordinarily the formulation under these circumstances is in terms of "standing" rather than in terms of the existence of a justiciable controversy, but the same principles apply in both instances.[8]

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[7] The Court of Appeals for the District of Columbia Circuit is, of course, an Article III court. *O'Donoghue* v. *United States,* 289 U.S. 516. While it may be that it can be given non-judicial power, *cf. Glidden Company* v. *Zdanok,* 370 U.S. 530, 580-581, unless the Congress confers such power the court can act only if a case or controversy is presented. And this Court has held that, in reviewing decisions of the Federal Communications Commission, the Court of Appeals exercises judicial, not administrative, authority. *Federal Radio Comm'n* v. *Nelson Bros. Co.,* 289 U.S. 266, 274-278. We discuss below, pp. 18-21, the possibility that a 1952 amendment to the Communications Act conferred administrative powers upon the Court of Appeals.

[8] "Limitation on 'the judicial Power of the United State' is expressed by the requirement that a litigant must have 'standing to sue' or, more comprehensively, that a federal court may entertain a controversy only if it is 'justiciable'. . . . The jurisdiction of the federal courts can be invoked only under circumstances which to the expert feel of lawyers constitute a 'case or controversy'." Frankfurter, J. concurring in *Anti-Fascist Committee* v.

Obviously, a denied applicant has standing to appeal initially when it asserts that its application has been improperly denied. But a controversy may cease to be justiciable during the course of litigation, see, *e.g.*, *Taylor* v. *McElroy*, 360 U.S. 709; *Gray* v. *Board of Trustees*, 342 U.S. 517; *United States* v. *Munsingwear*, 340 U.S. 36, 39; *Ickes* v. *Associated Industries of New York State*, 320 U.S. 707; *Little* v. *Bowers*, 134 U.S. 547; *California* v. *San Pablo Etc. R.R.*, 149 U.S. 308; and that is precisely what happened when the Court of Appeals determined that the Commission had properly disqualified JBC. That determination having been made, JBC had no standing to challenge any other aspects of the Commission's decision, and the Court in consequence had, as to the remainder of the case, no jurisdiction except to dismiss the appeal.

The governing principle is that, where the decision against a party on one or more of several issues presented is dispositive of that party's claim, the court may not decide any other issues because the party has lost its justiciable interest in securing a decision as to those issues. Thus, in *Electric Fittings Corp.* v. *Thomas & Betts Co.*, 307 U.S. 241, a patent infringement case, the Court held that, once the lower court had found that there was no infringement by defendants, it could not go on to decide that plaintiff's patent was valid. In explaining this decision in *Altvater* v. *Freeman*, 319 U.S. 359, 363, this Court stated:

> "The District Court adjudged a claim of a patent valid although it dismissed the bill for failure to prove infringement. We held that the finding of validity was immaterial to the disposition of the cause and that

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McGrath, 341 U.S. 123, 150. See also the discussion in the dissenting opinion of Mr. Justice Douglas in *Communications Comm'n* v. *N.B.C.*, 319 U.S. 239, 264.

> the winning party might appeal to obtain a reformation of the decree. To hold a patent valid if it is not infringed is to decide a hypothetical case."[9]

The *Electric Fittings* rule would seem to be fully applicable here. After the reviewing court decided that JBC's cause was lost because it was properly disqualified, it seems clear enough that the decision of any further questions would be "to decide a hypothetical case."

That this is the correct approach has been recognized by the court below in a series of cases prior to the one at bar. *Simmons* v. *FCC*, 145 F. 2d 578 (C.A.D.C. 1944), *Simmons* v. *FCC*, 169 F. 2d 670 (C.A.D.C. 1948), *cert. den.*, 335 U.S. 846, and *Mansfield Journal Co.* v. *FCC*, 180 F. 2d 28, 36-37 (C.A.D.C. 1950), all involved appeals by parties whose applications for licenses had been denied by the Commission while mutually exclusive applications by others had been granted. In each case the court refused to inquire into the validity of the grants once it affirmed the Commission's denial of appellant's application upon independent rather than comparative grounds. As the court explained in the *Mansfield Journal* case:

> "Mansfield's application has been denied on totally independent grounds which this Court has herein sustained. The fact that Fostoria's application is mutually exclusive of Mansfield's is now immaterial. Mansfield's status has become that of a member of the general public."

Similar decisions involving review of Civil Aeronautics Board orders were rendered in *Continental Southern Lines*,

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[9] The Court at this point cited *Cover* v. *Schwartz*, 133 F. 2d 541 (C.A. 2, 1942) in which Judge Frank made a detailed analysis of this doctrine. He concluded that "once the issue of infringement is decided against the patentee, there exists no case or controversy justifying a decision in his favor that the patent is valid." *Id.*, at p. 545.

Inc. v. *CAB*, 197 F. 2d 397 (C.A.D.C. 1952), *cert. den.*, 344 U.S. 831, and *North American Airlines, Inc.* v. *CAB*, 237 F. 2d 209 (C.A.D.C., 1956). See, also, *Southwestern Publishing Co.* v. *FCC*, 243 F. 2d 829, 832-33 (C.A.D.C., 1957); *Granik* v. *FCC*, 252 F. 2d 822 (C.A.D.C., 1948).

Indeed, the *Electric Fittings* and *Simmons* principle would appear to apply *a fortiori* here. At least the parties in those cases at the time of argument had adverse interests respecting the issues of patent validity and licensee qualifications. But in the case at bar JBC was never concerned with the determination of whether strangers to the litigation should be allowed to become applicants and had never challenged the right of the Commission to make a grant in the proceedings before it to one of the original applicants. Thus there was lacking that "lively conflict between antagonistic demands, actively pressed, which makes litigation of the controverted issue a practical necessity." *Poe* v. *Ullman*, 367 U.S. 497, 503. See also *United States* v. *Fruehauf*, 365 U.S. 146, 157.

Although the *Simmons* line of cases was called to the lower court's attention, it did not even advert to them or otherwise explain why they were not controlling,[10] except for the bare assertion that the "whole case is . . . in process of decision and our review of it may be completed on all issues."[11] But if this rationale were sound, there

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[10] The dissenting judge below, who agreed with the majority that the court should decide the issue of petitioner's qualifications, did refer to these cases but said only that "[w]hen a regulatory agency so far departs from protecting the public interest, some means must be found to ventilate the processes employed." See p. 32, *infra*.

[11] The court did observe that the appeal rested "in good part upon [JBC's] claim that the Commission used a double standard on the issue of disqualification—one as to it and another as to Florida-Georgia." But the "double standard" claim could at most afford a basis for a determination by the court whether or not the Commission's disqualification of JBC was based on an unfair standard, and would not justify consideration of issues that were not even raised.

could never be a moot case once an appeal has been argued to the court. The case or controversy requirement means more than that there are issues presented. The issues must affect the litigants before the court. Once JBC's disqualification was affirmed, every vestige of interest in the proceedings on its part was gone. There remained before the court only the Commission and petitioner, both supporting the Commission's decree. There were thus present those circumstances which in the past have uniformly resulted in a dismissal of the proceedings.

The short of the matter is that the court below, because it differed with the Commission as to the requirements of the public interest, entered an order that advantaged no party before it. This is wholly appropriate for an administrative agency; it is beyond the power of an Article III court. The action of the Court of Appeals constituted a significant departure from an important constitutional limitation that calls for correction by this Court.

2. *Statutory scope of review.* Even assuming the existence of a case or controversy, the action of the court below setting aside the grant to petitioner and ordering the Commission to accept new applications was inconsistent with this Court's decisions delineating the statutory scope of judicial review of Commission decisions.

This Court has repeatedly emphasized that the Congress has entrusted to the Commission the responsibility to determine what the public interest requires with respect to the regulation of the communications industry, and that the jurisdiction of the courts is confined to correcting errors of law made by the Commission. See, *e.g.; FCC* v. *Schreiber,* 381 U.S. 279; *FCC* v. *Pottsville Broadcasting Co.,* 309 U.S. 134, 138; *Communications Comm'n* v. *WJR,* 337 U.S. 265, 272; *Communications Comm'n* v. *WOKO,* 329 U.S. 223, 229; cf. *Universal Camera Corp.* v. *Labor Board,* 340 U.S.

474, 488; *NLRB* v. *P. Lorillard*, 314 U.S. 512. As the Court has held as recently as last term in *Schreiber*, the resolution of competing policy considerations is for the Commission, and the courts may reverse the Commission only if the agency's action was "arbitrary or capricious." 381 U.S., at 293.

The action of the court below in overturning the Commission's decision to award the license to petitioner on the basis of the original record of proceedings cannot be reconciled with these decisions of this Court. The procedure adopted by the Commission is supported by the following perfectly reasonable considerations: the existence of an untainted hearing record, the desirability of adherence to the Commission's standard procedures respecting the "cut-off" of applications so as to insure administrative finality,[12] and the unfairness of imposing a serious penalty upon a wholly innocent licensee. In consequence, the court below could not properly have termed the agency action "arbitrary or unreasonable," or without "warrant in the record or a reasonable basis in law." *Board* v. *Hearst Publications*, 322 U.S. 111, 131. But the court did not even purport to follow these well established standards. Rather, it reversed the Commission simply on the basis of its own conception of

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[12] The Commission's application of its "cut-off" rules, 47 C.F.R. 1.591, an aspect of its procedures made necessary by the doctrine of *Ashbacker* v. *FCC*, 326 U.S. 327, see *Ranger* v. *FCC*, 294 F. 2d 240 (C.A.D.C. 1961), has uniformly been upheld in the courts. *Ranger* v. *FCC, supra; Century Broadcasting Corp.* v. *FCC*, 310 F. 2d 864 (C.A.D.C. 1962); *KFAB Broadcasting Co.* v. *FCC*, 177 F. 2d 40 (C.A.D.C. 1949); *St. Louis Amusement Co.* v. *FCC*, 259 F. 2d 202 (C.A.D.C. 1958). These rules have consistently been applied so as to result in the grant of a permit where there is only a single qualified applicant because for one reason or another other competing applicants have withdrawn or been disqualified. Even in the other cases involving *ex parte* representations, where a previously unsuccessful applicant—as contrasted with the successful applicant here—was held to be the sole remaining qualified applicant, a permit was granted and a short term license issued. These decisions were upheld by the court below. *WKAT, Inc.* v. *F.C.C.*, 296 F. 2d 375 (C.A.D.C. 1961); *South Florida Television Corp.* v. *F.C.C.* — F. 2d — (C.A.D.C. July 8, 1965).

how the public and private interests involved could best be served—an impermissible ground under decisions such as *Schreiber*, 381 U.S., at 291.

The error of the court below is accentuated by the fact that the ground upon which it apparently acted would not have been an adequate basis to open Channel 12 to new applicants even if it had been relied upon by the Commission. The court stated that the public interest required that new applications be accepted because the original grant to petitioner "must be held to have been influenced by the *ex parte* representations made for [petitioner's] benefit." But this assertion, even if supported by the record, would have been a basis only for voiding the original grant. That, of course, is just what the Commission did. The court did not suggest that the record of Commission proceedings was affected in any way, and thus stated no ground adequate to support the conclusion that the Commission could not or should not have made a new grant on the basis of that record.[13]

Moreover, this conclusion of fact by the court is not supported by any subsidiary findings by the court, for it made none, or by any facts found by the Commission. The Commission set the original grant aside, not because it found that any *ex parte* representations had influenced that grant, but solely because a disqualified Commissioner had participated in the proceeding. It is evident from the Commission's and the Examiners' opinion (pp. 23-26 *infra*) that they did not believe the grant itself had in any way been influenced by these *ex parte* contacts. The court's conclusion to the contrary has no support in the record, and significantly the court made no reference to the facts or

[13] It may be noted that the Court did not even intimate that it disagreed with the Commission's obvious view that the record of petitioner's qualifications was not stale. Plainly, such a determination is within the discretion of the Commission. Moreover, the remedy for a stale record is to bring it up to date, not to cancel the entire proceeding and begin all over.

circumstances upon which it relied.[14] The critical consideration, however, is that the court intruded upon the Commission's jurisdiction even to the point of making new findings of fact.

The court's failure to adhere to the *Schreiber* doctrine had still another aspect—the *sub silentio* decision by the court of an important question relating to the Commission's jurisdiction, a question which the Commission had expressly refused to decide. Petitioner had contended, both to the Commission and to the court, that while the Commission had ample authority under Section 312, 47 U.S.C. 312, to hold a revocation of license proceeding, it had no power to reopen the original proceedings, since under the Communications Act of 1934 the grant of a construction permit and issuance of a license after no

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[14] The Commission found, based upon what it described as a vigorous and conscientious investigation of petitioner, its principals and associates, that there were two efforts to influence the Commission in petitioner's favor. Neither effort had been instigated by or known to any of petitioner's shareholders, officers, agents or employees, and both were insignificant. The first was a letter to Commissioner Mack constituting "an expression of an opinion by an interested citizen who was acquainted with and held the principals of Florida-Georgia in personal regard," to which Commissioner Mack replied that the "matter is to be set for oral argument and . . . will be carefully considered." (J.A. 293, Tr. 6673). The second was an effort by a political opponent of JBC to indicate to Commissioner Lee a preference for petitioner, but he was summarily rebuffed before he could make his views fully known. There was also evidence before the Commission that Commissioner Mack had told a third party that he had promised one of petitioner's principals help in obtaining the television facility in Jacksonville. But the court obviously could not have had this evidence in mind, for its only relevance would have been to petitioner's qualifications and the court's affirmance of the Commission's finding that petitioner was qualified showed that it approved the Commission's refusal to credit this hearsay evidence. The reasons that led the Commission not to credit this evidence and the probable explanation of the Commission's failure to elicit testimony from Mr. Mack require exposition at a length more appropriate to a brief on the merits than to a petition for certiorari. They are set out in the record in the Answer of Intervenor in Support of Rehearing in the court below at pp. 15-20. The other evidence that might conceivably be relevant to the court's conclusion is too trivial or remote to warrant mention.

appeal is taken is a final determination that may not be reopened by the Commission. See *WPHF Broadcasting Co.*, 15 Pike & Fischer RR 542, 543-44 (1957).

The Commission recognized that the contention was substantial [15] but held that it need not reach this question, stating that its action in reopening the proceeding and voiding the initial grant had no adverse effect upon petitioner because it was simultaneously making a new grant (App. B, p. 41, *infra*). The court below evidently did not consider this issue to be before it. Thus this issue has been decided against petitioner although it has been considered neither by the court nor by the Commission.

The very most the court might have been at liberty to do in these circumstances would have been to remand to the Commission if it thought additional findings were desirable, or if it wanted an initial determination as to the Commission's power to act in other than in revocation proceedings, or if it wanted the Commission to set forth with particularity the reasons supporting its decision to award the permit upon the basis of the original record. Where it appears to a reviewing court that the appropriate determination of a case may depend upon the resolution of an issue not passed upon by the agency, the proper course is to remand

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[15] In our view, the suggestion of the Hearing Examiners that *Hazel-Atlas Glass Co.* v. *Hartford-Empire Co.*, 322 U.S. 238, could be relied upon to support the Commission's power to reopen the proceedings is unsound. That case held only that a judge-created rule that judgments could not be disturbed after the expiration of their term of entry should not be given effect to prevent equitable relief against fraudulent judgments. A decision to the contrary would have enabled the offending party to retain the fruits of his fraudulent judgment. But here, in the first place, the finality of the grant was established by Congress in Section 403 of the Act. 47 USC 403. See, also, Sections 402 and 405, 47 USC 402, 405, and *Civil Aeronautics Board* v. *Delta Air Lines, Inc.*, 367 U.S. 316, 322, 334. Second, the Commission would not be powerless to protect the public interest since the Congress provided, in Section 312 of the Act, for the revocation of licenses, and a finding that a license had been procured by fraud or other serious misconduct is plainly ground for revocation.

the case to the agency. As the Court put it in *Unemployment Commission* v. *Aragon*, 329 U.S. 143, 155:

> "The responsibility of applying the statutory provisions to the facts of the particular case was given in the first instance to the Commission. A reviewing court usurps the agency's function when it sets aside the administrative determination upon a ground not theretofore presented and deprives the Commission of an opportunity to consider the matter, make its ruling and state the reasons for its action."

See, also, *FPC* v. *Idaho Power Co.*, 344 U.S. 17, 20; *Pinellas Broadcasting Co.* v. *FCC*, 230 F. 2d 204, 211-214 (C.A.D.C. 1956); *Fleming* v. *FCC*, 225 F. 2d 523, 526 (C.A.D.C. 1955).

3. *Related decisions of the Court of Appeals.* As we suggested earlier, the decision of the court below in this case does not stand alone. Rather, a series of recent decisions by that court appears to reflect the view that its jurisdiction to review Federal Communications Commission decisions is broader than the ordinary scope of judicial review of administrative agency action. In those decisions, as in the one at bar, the court's holdings were based not on determinations that the Commission had been arbitrary or capricious but rather upon the court's own announced view of the public interest.

WORZ, Inc. v. *FCC*, 345 F. 2d 85 (1965), here on petition for certiorari in No. 204 is one example. In an earlier decision in the same case, *WORZ, Inc.* v. *FCC*, 323 F. 2d 618 (1963), *cert. denied* 376 U.S. 914, the Court of Appeals, although accepting the Commission's findings of fact concerning asserted *ex parte* representations, remanded the case to the Commission for an initial determination whether to grant the application of one of two qualified applicants or, in the light of the age of the record, to reopen the proceedings. This action by the court was

in full accord with the decisions of this Court respecting the limited scope of judicial review. However, when the Commission granted one of the applications the Court of Appeals reversed and ordered the Commission to open the proceedings to new applicants. The court did not purport to find the Commission's decision unreasonable or plainly erroneous. It said only that in its view the public interest was not "adequately effectuated" by the Commission's decision. 345 F. 2d at 86.

In several other recent decisions as well, the court below has acted as if it had both administrative and judicial powers. In *WMOZ, Inc.* v. *FCC,* 344 F. 2d 197 (C.A.D.C. 1965), the Court of Appeals reversed a Commission decision denying a motion to reopen a record to receive newly discovered evidence. The court did not say that the Commission's decision was unreasonable or arbitrary. It said only that it would have been better and in the public interest for the motion to have been granted. It then directed the Commission not only to accept the proffered evidence, which was in the form of affidavits, but to take oral testimony. Surely this was an interference in the Commission's procedures not contemplated by *Schreiber, WJR* and *Pottsville, supra.*

In *Citizens Television Protest Committee* v. *FCC,* — F. 2d —, (May 7, 1965), the court reversed a Commission holding that a petition for reconsideration, filed by a person not a party to the prior Commission proceedings, failed to satisfy the requirement of the Commission's rules that good reason be shown for a failure to participate at an earlier stage. Judge Fahy dissented on the ground that the Commission's decision was not unreasonable. The majority opinion, however, did not even consider this question. Instead it embarked upon a wide ranging examination of the merits far more appropriate for an administrative agency than a reviewing court. It ordered a new hearing and prescribed

in detail the issues that were to be tried. The reversal was based in principal part upon a conclusion that the Commission had failed to provide adequate protection to a party that disclaimed any need therefor and that in fact was actively supporting the Commission's decision.

In *South Florida Television Corp.* v. *FCC*, — F. 2d — (July 8, 1965), an appeal involving competing applicants for a construction permit, the court directed the parties to file briefs discussing the bearing upon the public interest of the number, length and audio volume of commercials in relationship to the other parts of the program. After all the parties joined in contending that the court had no authority to raise this new issue,[16] the court decided the case although apparently without relinquishing its view that it had the authority to require that these matters be taken into consideration. See footnote 3 at p. 4 of the slip opinion of the court.

In his conditional petition for certiorari in No. 397, *United States* v. *American Broadcasting-Paramount Pictures, Inc.*, pp. 15, 11, the Solicitor General summarizes the problem as a "policy dispute between the Commission and the court below" and asserts that the position of the court may be in conflict with the decisions of this Court that hold that the Congress has assigned policy determinations to the Commission and not to the courts.

These cases are illustrative of a significant change in the division of responsibility between the Communications Commission and the Court of Appeals for protecting the public interest in the field of radio and television broadcasting.[17] The position of the Court of Appeals can be sus-

[16] See the dissenting opinion of Judge Wright at p. 6 of the slip opinion.

[17] In *James F. Rivers, Inc.* v. *FCC*,—F. 2d — (August 24, 1965), the Chief Judge, concurring, said explicitly that the court does not consider itself bound by a narrow scope of review when considering a Commission determination that a radio station did or did not discriminate against a

tained only upon a speculation that it has found a new statutory authority to exercise a policy supervision over the Commission. That speculation derives chiefly from *Halpern and Seltzer* v. *FCC* (March 17, 1965), now before this Court on petition for certiorari in No. 500. There, as in the case at bar, the Court of Appeals ordered the Commission to accept new applications for a permit even though the court did not hold that the party to whom the Commission proposed to make the grant was unqualified. The court, in granting that relief, took the extraordinary action of rejecting a considered decision of an administrative agency without writing an opinion. The respondent in that case, a prospective applicant for the permit, had urged the court to act under what it asserted to be the "original jurisdiction" conferred by Section 402(h) of the Communications Act. 47 U.S.C. 402(h). Section 402(h) provides that, upon remand to the Commission following a reversal by the Court of Appeals, "it shall be the duty of the Commission, in the absence of proceedings to review such judgment, to forthwith give effect thereto and unless otherwise ordered by the court, to do so upon the basis of the proceedings already had and the record upon which said appeal was heard and determined." 47 U.S.C. 402(h).

This provision was added to the Act in 1952 in response to *FCC* v. *Pottsville Broadcasting Co.*, 309 U.S. 134, 146. There this Court had upheld as within the Commission's discretion its action in opening a proceeding to new applicants after a party to the initial proceeding had secured a reversal of the Commission in the Court of Appeals. The Congress thought this unfair to the appealing party, and so specified that in such circumstances the proceedings after

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segment of the community by failing to broadcast programs which satisfied the needs of that segment. Three cases in this Court were cited, none of which support his position.

remand should be confined to the original parties and the original record "unless otherwise ordered" by the court.

This excepting phrase might conceivably be thought to give the Court of Appeals jurisdiction to direct the Commission's proceedings upon remand in accord with the court's conception of the public interest rather than the Commission's. So read, it would reverse not merely the result of *Pottsville,* but also its broad principle that the Commission has the primary responsibility to determine the course and outcome of its proceedings.[18]

But while there is some legislative history that might support such an interpretation of the provision,[19] so far as we are aware until *Halpern and Seltzer* no court had ever suggested that Congress intended the "unless otherwise ordered" phrase to alter so radically the relationship between court and agency. Rather, in our view, the function of Section 402(h) is simply to limit the Commission's freedom following remand while permitting the court to authorize relief appropriate in the sort of case in which the Commission has erred, for example, in refusing to consider an application in the initial proceeding, or where it has erroneously excluded evidence. The effect of the 1952 amendment, therefore, was to increase the number of cases that would be decided on the basis of the original record.

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[18] It might also raise questions of constitutional magnitude. See *Glidden Company* v. *Zdanok,* 370 U.S. 530, 580-581.

[19] "Subsection (h) contains provisions which are intended to confer upon the appellate court a measure of control commensurate with the dignity and responsibility of that tribunal, requiring the Commission to give effect to the judgment of the court in the absence of proceedings to review. The committee points out that under the language of this subsection the appellate court would have ample authority, either on its own motion or upon the petition of the Commission or any other litigant, to provide, either as a part of its original decree or supplementary thereto, that new parties and new issues may be introduced and a new record made after remand to the Commission. This authority stems from the phrase 'and unless otherwise ordered by the court.'" Sen. Rep. No. 44, 82nd Cong., 1st Sess., p. 12.

That this is the correct reading of this section is demonstrated by the fact that section 402(g), enacted at the same time as section 402(h), provides that appeals shall be determined "in the manner prescribed by section 1009(e) of Title 5." 47 U.S.C. 402(g). That section, 10(e) of the Administrative Procedure Act, provides for a limited judicial review only and one that is applicable to agency action generally. Moreover, if section 402(h) is read to grant the Court of Appeals authority to make administrative decisions, this might deprive this Court of the power to review those decisions.[20] Such an intention should not lightly be ascribed to the Congress, particularly since section 402(j) expressly provides for such review.

If, however, the court below has at this late date correctly discovered in section 402(h) a new source of authority over the decisions of the Commission, it is of evident importance that this be made known to the agency and to the persons subject to its regulatory jurisdiction. Since the court's power to act is dependent in any event upon an appeal being taken from the Commission's decisions, litigants must be advised as to what cases may appropriately be brought to the court and what relief may properly be obtained. And if the Congress has created the anomalous situation under which a different scope of review is applicable to FCC decisions than is applicable to the decisions of other independent agencies and the decisions of the court may properly be based upon its view of the requirements of the public interest, then the nature and limitations, if any, of this broadened review urgently require definition by this Court.

If, on the other hand, the review by the Court of Appeals under Section 402(h) is not to be distinguished from the

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[20] *Federal Radio Commission* v. *Genereal Electric Co.*, 281 U.S. 464, 469; *Pope* v. *United States*, 323 U.S. 1, 13; *Gordon* v. *United States*, 2 Wall. 561; see 117 U.S. 697.

usual review applicable to other agency decisions—which we believe to be the case—then the repeated departure by the court below from the standards laid down by this Court calls for a restatement of those standards in this and the cases presenting related questions that are now before the Court.

Respectfully submitted,

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